89-800

No.

IN THE

Supreme Court of the United States

October Term, 1989

NOEL ALVARADO,

Petitioner,

— v. —

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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November 20, 1989

QUESTION PRESENTED

Whether the Sixth Amendment proscribes admission, in a joint trial of two defendants, of the non-testifying co-defendant's confession, inculpatory of the non-confessing defendant, which is redacted by replacing his name with the neutral term "another person", an issue specifically undecided in *Richardson* v. *Marsh*, 481 U.S. 200, 211 n. 5 (1987), and the subject of dispute, since *Richardson*, among the Second, Fifth, Eighth and Eleventh Circuits.

LIST OF PARTIES

The parties to the proceeding below were the petitioner Noel Alvarado and the respondent United States of America. Mayra Sanabria was a separate defendant-appellant in the Court below.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Noel Alvarado, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on August 9, 1989.

OPINIONS BELOW

The order of the United States Court of Appeals for the Second Circuit, denying the petition for rehearing and suggestion for rehearing *en banc* is unpublished. It is included in the Appendix hereto at p. A-1.

The opinion of the United States Court of Appeals for the Second Circuit is reported at 882 F.2d 645. It is included in the Appendix hereto at p. A-2.

The order of the United States District Court for the Southern District of New York entering judgment against petitioner upon a jury verdict is unpublished. It is included in the Appendix hereto at p. A-25.

The memorandum opinion and order of the District Court for the Southern District of New York denying petitioner's motion for a severance is unpublished. It is included in the Appendix hereto at p. A-29.

JURISDICTION

The judgment of the Court of Appeals was dated and entered August 9, 1989. Petitioner's timely request for rehearing was denied in all respects on September 21, 1989. The jurisdiction of this Court to review the judgment of the Court of Appeals by writ of certiorari is conferred by Title 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him . . . ."

STATEMENT OF THE CASE

In this case, the Sixth Amendment right of Noel Alvarado ("Alvarado") to confront the witnesses against him was violated by the introduction of a confession made by his non-testifying co-defendant, Mayra Sanabria ("Sanabria"), his common-law wife in their joint trial on narcotics trafficking charges. The confession was redacted in such a way that "another person" was inculpated but not named, and the jury knew or reasonably concluded that the other person was Alvarado.

Alvarado was arrested with Sanabria on November 20, 1987. Two others were arrested on the same date. One, Alex Sanchez ("Sanchez"), a minor, was arrested in the apartment where Alvarado was arrested, and one, Charles Shannon ("Shannon"), was arrested on the street near the building where the others were arrested.[1]

While in custody, Sanabria made certain inculpatory statements to the officers detaining her. Those statements also inculpated Alvarado. Through leading questions approved by the Court, four such redacted statements were admitted into evidence during the testimony of a Bureau of Alcohol Tobacco and Firearms (BATF) agent who had assisted in the arrest. In each of the statements, the words "another person" replaced Alvarado's name or his nickname (Scoobie) in the original statement. In the redacted statements, Sanabria admitted

> that she had told *another person* not to sell to the confidential informant because she thought . . . [he] was a cop.
>
> * * *
>
> that she had helped *another person* package the coke.
>
> * * *
>
> that the main individual who supplied *another person* never dropped off the cocaine but would send one of the neighborhood teenagers as the runner.
>
> * * *

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1. Shannon fled before trial and Sanchez was dealt with as a minor.

> [t]hat she had obtained the money from *another person* by the holding cell.[2]

Alvarado objected to the proposed redacted statements and insisted on a severance. The District Court denied Alvarado's timely motion for a severance but gave a limiting instruction.

Alvarado was Sanabria's common-law husband; he was her only co-defendant on trial; he was the only other arrested individual whose activities at BATF headquarters (the location of the holding cell) were discussed in any way at trial; he was described by the prosecution as "Pop" in what it characterized as a "Mom and Pop" drug dealing operation. It was obvious that "another person" was Alvarado. *See* Appendix, pp. A-31 to A-38.

After his conviction on all three Counts, Alvarado appealed to the United States Court of Appeals for the Second Circuit. Sanabria also appealed on other grounds and the appeals were consolidated. In the Second Circuit, Alvarado argued, *inter alia*, that the jury knew or inferred that he was "another person" and that the redaction failed to protect his rights under the Confrontation Clause of the Sixth Amendment, *Bruton* v. *United States*, 391 U.S. 123 (1968), and *Richardson* v. *Marsh*, 481 U.S. 200 (1987).

While the *Alvarado* appeal was pending before the Second Circuit, that Court decided *United States* v. *Tutino*, 883 F.2d 1125 (2d Cir. 1989), a case involving four defendants. There, two defendants were named in their co-defendant's confession, but the confession, as admitted, incriminated unquantified "others", "other people", and "another

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2. For complete versions of the statements, see Appendix, p. pp. A-34 to A-35.

person''. The Second Circuit held ''the redacted statement was not incriminating on its face, and its admission did not violate [the defendants'] *Bruton* rights.'' *Id.* at 1135. In its decision affirming Alvarado's conviction, the Second Circuit relied on *Tutino*, quoting that case at great length.

Alvarado filed a timely petition for rehearing and suggestion for rehearing *en banc*, in which he pointed out that the Second Circuit's decision was in conflict with earlier Second Circuit precedent, and with *United States* v. *Petit*, 841 F.2d 1546 (11th Cir.), *cert. denied sub nom. Fernandez* v. *United States*, 108 S. Ct. 2906 (1988), in which the Eleventh Circuit relied on the distinction drawn in *Richardson* between complete redaction and redaction of the defendant's name only. *Petit* found that where the complaining defendant, referred to as ''a friend'', was incriminated in the co-defendant's confession, the jury would reasonably conclude, based on other evidence at trial, that the non-confessing defendant was the ''friend'', and that *Bruton* was violated. *Id.* at 1555-57.

We assert that that the *Petit* analysis is constitutionally required and that the Second Circuit erred by ignoring the fact that, based on other evidence, the jury would reasonably conclude that Alvarado was the other person inculpated in Sanabria's statements.

REASONS FOR GRANTING THE WRIT

I

The Decision of the Court of Appeals Conflicts With the Decisions in Other Circuits on an Issue Specifically Left Open in *Richardson* v. *Marsh*.

Richardson rejected the ''contextual approach'' for determining whether the admission of a non-testifying co-defendant's confession violates the non-confessing

defendant's Sixth Amendment right to confront his witnesses where "the confession is redacted to eliminate not only the defendant's name, but any reference to her existence." 481 U.S. at 212 (footnote omitted).[3] The *Richardson* decision specifically left open the question presented here: "We express no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." *Id.* n.5.[4]

Since *Richardson*, four Circuit Courts have addressed this issue, in inconsistent rationales and decisions. *See United States* v. *Alvarado*, 882 F.2d 645 (2d Cir. 1989); *Petit*, 841 F.2d 1546; *United States* v. *Espinoza-Seanez*, 862 F.2d 526 (5th Cir. 1988); *United States* v. *Garcia*, 836 F.2d 385 (8th Cir. 1987); *see also Tutino*, 883 F.2d 1125 (relied upon by the Second Circuit in this case); *United States* v. *Bennett*, 848 F.2d 1134 (11th Cir. 1988) (following *Petit*); *United States* v. *Vasquez*, 874 F.2d 1515 (11th Cir. 1989).[5]

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3. This type of redaction — where any reference to the non-confessing defendant is redacted — is referred to herein as "complete redaction".

4. This type of redaction — where a neutral term is substituted for the name of the non-confessing defendant — is referred to herein as "name redaction".

5. Three Circuit Courts have since followed *Richardson* in complete redaction situations. *United States* v. *Sherlock*, 865 F.2d 1069 (9th Cir. 1989) (reversal based on prosecutor's attempt to link defendant to completely redacted confession); *United States* v. *Yarbrough*, 852 F.2d 1522, 1537 (9th Cir.) ("statement was completely redacted"), *cert. denied*, 109 S. Ct. 171 (1988); *United States* v. *Markopoulos*, 848 F.2d 1036 (10th Cir. 1988) (complete redaction).

(1) Richardson

Even before *Richardson*, a split existed in the Circuit Courts of Appeals. Generally, without recognizing the distinction between name redaction and complete redaction, courts differed widely on whether or not evidence other than the redacted confession should be considered in determining whether a redacted confession was sufficiently incriminating of the non-confessing defendant that it violated the concern of *Bruton*.

Some Circuits looked only to the confession itself, regardless of other circumstances. "A defendant's *Bruton* rights would be violated . . . only if the statement, standing alone, would clearly inculpate him without introduction of further independent evidence." *United States* v. *Wilkinson*, 754 F.2d 1427, 1435 (2d Cir.), *cert. denied*, 472 U.S. 1019 (1985). "[In *Bruton*] the challenged *statement* (and we emphasize, the *statement only*) directly implicated the complaining defendant[.]" *United States* v. *Belle*, 593 F.2d 487, 493 (3d Cir.) (*en banc*) (emphasis in original), *cert. denied*, 442 U.S. 911 (1979).

Other Circuits recognized that, in certain instances, the other evidence introduced at trial will make it so apparent that the non-confessing co-defendant was the person incriminated by the confession that the rule of *Bruton* is violated. For example, in *Serio* v. *United States*, 401 F.2d 989 (D.C. Cir. 1968) (*per curiam*), after remand from this Court, *see* 392 U.S. 305 (1968), the Court of Appeals for the District of Columbia held that "under the principles of *Bruton*, the instruction to disregard the confession in considering Serio's case would not have avoided prejudicial error, due to the *well-nigh inevitable association of Serio as the 'other man' referred to in LaShine's confession*." 401 F.2d at 990 (emphasis added).

Besides the widespread conflict on the use of contextual implication generally, there was a conflict pre-dating *Richardson* on the specific question presented here — contextual implication in name redaction cases. *Compare United States* v. *Pickett*, 746 F.2d 1129 (6th Cir. 1984), (permitting analysis based on whether, when linked with other evidence, redacted confession implicated non-confessing defendant), *cert. denied*, 469 U.S. 1226 (1985); *Clark* v. *Maggio*, 737 F.2d 471 (5th Cir. 1984) (same), *cert. denied*, 470 U.S. 1055 (1985); *Slawek* v. *United States*, 413 F.2d 957 (8th Cir. 1969) (same), *with United States* v. *Madison*, 689 F.2d 1300 (7th Cir. 1982) (restricting analysis to whether confession is facially inculpatory of co-defendant), *cert. denied*, 459 U.S. 1117 (1983); *United States* v. *Stewart*, 579 F.2d 356 (5th Cir.) (same), *cert. denied*, 439 U.S. 936 (1978).[6]

Richardson did not address the name redaction issue. Its rule that the Sixth Amendment and *Bruton* are not violated "when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to her existence[,]" 481 U.S. at 211, is limited to most complete redaction cases.[7] If the confession makes no mention of the non-confessing defendant then, as to him, that confession is simply evidence that the crime in question occurred. In other

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6. The "contextual implication" conflict in the Circuit Courts, described at length in the Sixth Circuit's decision in *Marsh* v. *Richardson*, 781 F.2d 1201, 1207-11 (6th Cir. 1986), was presented to this Court in that case; however, only the complete redaction question was squarely presented.

7. *Cf. United States* v. *Key*, 725 F.2d 1123 (7th Cir. 1984) (though not naming the non-confessing defendant or making reference to his existence, co-defendant's confession, by clear logical implication, inculpated the non-confessing defendant).

cases, if "evidentiary linkage" is used to connect a defendant with a crime, he may not object to proof that the crime occurred. Neither may he object to the introduction of a confession which helps establish the crime and the guilt of another defendant.

Here, had Sanabria's statement that she had helped "another person" package the cocaine been redacted to say simply that she had packaged, helped package, or been involved in packaging the cocaine, Alvarado would have no complaint pursuant to *Richardson* even though he might have been "linked" to the cocaine through other evidence.

Since *Richardson*, four Circuits have dealt with this question in name redaction situations and their rationales present a conflict among the Circuits. *See supra* at 6. Indeed, because *Richardson* was limited to complete redaction cases, and expressed no opinion as to name redaction situations, the conflict in the Circuits exists not only among the cases after *Richardson*, but among cases decided previously. *See supra* at 8.

(2) Second, Fifth and Eighth Circuits

In this case and in *Tutino*, the Second Circuit incorrectly applied the non-contextual approach described in *Richardson*, a complete redaction case, to a name redaction situation. The Court asserted that *Richardson* "explicitly rejected a 'contextual' approach, focusing on whether the redacted statement itself is 'facially incriminating' as to the co-defendant. [481 U.S.] at 208-209, 107 S.Ct. at 1712-13 [sic]." *Tutino*, 883 F.2d at 1135. This analysis ignores the setting of *Richardson* which, if it explicitly rejected the contextual approach at all, did not do so for name redaction cases, but only where "the confession is redacted to eliminate . . . any reference to the defendant's existence." 481 U.S. at 211.

Similarly, without any analysis of the distinction between the issue decided in *Richardson* and the issue left open in its footnote 5, the Fifth Circuit, in *United States* v. *Espinoza-Seanez*, 862 F.2d 526 (5th Cir. 1988), held that a confession using "the man" and "someone else" was admissible in a three-defendant case. *Espinoza-Seanez* was apparently not actually a redaction case, but nonetheless concededly raised a *Bruton* issue.

Finally, *United States* v. *Garcia*, 836 F.2d 385 (8th Cir. 1987), involved a redacted confession which stated that the confessing defendant delivered heroin, made several phone calls and was instructed to pay "someone". *Id.* at 389. The Court simply stated, "This Court has in the past approved redaction by eliminating reference to the defendant's name, *but not to his role in the crime.*" *Id.* at 390 (emphasis added).[8] Yet, even *Garcia* recognized the possibility that the use of "someone", when the confession also made "reference to [the defendant's] role [, might] take this case out of the rule in *Marsh*[.]" *Id.* at 391.

The application of *Richardson* in these name redaction cases presents a danger that courts are relying on it to allow juries to draw inferences which the *Richardson* Court never intended.[9]

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8. For this holding, the Eighth Circuit cited only *United States* v. *Brierly*, 501 F.2d 1024 (8th Cir.), *cert. denied*, 419 U.S. 1052 (1974), where one co-defendant pled guilty, testified, and implicated his co-defendants. The *Bruton* issue related to a separate, name-redacted confession.

9. *E.g.*, *United States* v. *Julio Castro-Vega*, No. 88 Cr. 797, slip op. (S.D.N.Y. Sept. 5, 1989) (1989 U.S. Dist. LEXIS 10366) ("substitution of the words 'other persons' in a confession replacing co-defendants name [sic] eliminated the Bruton problem notwithstanding that the jury could figure out who the others were from the remaining trial testimony") (citing *United States* v. *Knuckles*, 581 F.2d 305, 312-13 (2d Cir.), *cert. denied*, 439 U.S. 986 (1978)).

(3) The Eleventh Circuit

In *United States* v. *Petit*, 841 F.2d 1546 (11th Cir.), *cert. denied sub nom. Fernandez* v. *United States*, 108 S.Ct. 2906 (1988), the Eleventh Circuit considered the critical issue ignored by the Second, Eighth and Fifth Circuits: whether a jury would conclude that "another person" (or, in that case, the "friend") was the non-confessing defendant.

Petit involved a sting operation. Devarone, a detective, was to sell stolen goods in a truck to Fernandez. When the loaded truck arrived, Fernandez was present with Delgado and Villeda. Pasqual arrived shortly thereafter and called Petit to arrange to use a warehouse, where Petit worked, for storage. The truck and the individuals named above went to Petit's location, where unloading began. At that time, all five men were arrested. After a joint trial, Fernandez, Petit and Pasqual were convicted; Delgado and Villeda were acquitted.

At trial, two statements made by Pasqual to FBI agents were admitted against him. In one, Pasqual stated "that 'the unloaders' ... were new acquaintances of [Pasqual] and they were unaware the equipment had been stolen." In the other statement, Pasqual said "that he had called 'a friend,' requesting to store some 'stuff, television sets,' at the friend's warehouse." 841 F.2d at 1555.

The Eleventh Circuit recognized that *Petit* dealt directly with the issue not decided by *Richardson*. Just as *Richardson* prohibited reference to other evidence in a complete redaction situation, the *Petit* Court properly recognized that such evidence must be considered where a mentioned but unnamed person is incriminated. The Court concluded that "Pasqual's statement that he called a 'friend' who gave permission for the goods to be stored at his warehouse, when considered with the other evidence, could reasonably be understood only

as referring to Petit," *id.*, and that, even though the statements "'were not incriminating on [their] face, [they] became so... when linked with evidence introduced later at trial.'" *Id.* at 1556 (quoting *Richardson*). The Court added in a footnote: "Hence, we face a situation similar to that in *Serio* v. *United States* ... and similar to that described ... in footnote 5 of ... *Richardson*[.]" *Id.* n.15.

Although the *Petit* opinion does not make it clear whether or not "friend" came into evidence as part of a redaction, its discussion of *Richardson* and its reliance on *Serio* seem to indicate that it did. *Petit* was later followed in the Eleventh Circuit in another name redaction case: *United States* v. *Bennett*, 848 F.2d 1134 (11th Cir. 1988), which held that two non-confessing defendants were improperly referred to in a redacted confession as "they". "Far from being neutral, the pronoun 'they' clearly referred to [the defendants]." *Id.* at 1142 n.8. And in *United States* v. *Vasquez*, 874 F.2d 1515, (11th Cir. 1989), the Court considered whether the jury could have concluded that the non-confessing defendant was "the individual", and found that "nothing in the confession itself or the record as a whole... would have directly linked Vasquez in the minds of the jury as the 'individual[.]'" *id.* at 1518.

The *Richardson* decision itself implied that the non-contextual approach, used there in a complete redaction case, is not so readily applied to name redaction situations. In these cases, the redacted confession implicates "another person". If a direct enough link between the non-confessing defendant's identity and the identity of "another person" exists, it will be too "powerfully incriminating", *Bruton* 391 U.S. at 135, for a jury to ignore, despite the judge's instructions. These decisions reflect a practical recognition that even though a statement "standing alone, would [not] clearly

inculpate [the non-confessing defendant] without the introduction of further independent evidence[,]" (as required by *Wilkinson*, 754 F.2d at 1427, which was relied on in *Tutino*), it is undeniable that, with other evidence, the jury will sometimes know or infer the identity of "another person".[10]

A conflict regarding name redaction cases existed before *Richardson*, was left open by *Richardson*, and has continued since *Richardson*.[11] Some courts have ignored the fact that, in some instances, context compels the incriminatory inference; others have recognized that, if juries draw that inference, *Bruton* is violated. The issue has percolated long enough and is squarely presented for resolution in this case.

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10. For example, if Sanabria's statements in this case were that she helped her "husband" package the cocaine, or that she told her "husband" not to sell to the informant, the jury would know the identity of her "husband", but only through other evidence.

11. Reconciliation of this conflict would also limit and explain the holdings of *Wilkinson*, 754 F.2d 1427, and *Belle*, 593 F.2d 487. The language of those cases has come to stand for the absolute rule that courts should not consider whether the jury will draw a contextual inference. *Belle* was a complete redaction situation like *Richardson*, but its holding is far too sweeping. In *Wilkinson*, the defendant was mentioned completely innocuously. Yet, *Wilkinson* was relied on by the Second Circuit to extend *Richardson* to this case.

II

This Case is an Ideal Vehicle for Clarification of *Richardson* and Adoption of a Standard for Cases not Covered by *Richardson*.

Complete redaction — like that found in Richardson — should be required whenever possible.[12] But sometimes even complete redaction gives rise to the possibility that other evidence at trial will cause juries to identify an unmentioned but clearly incriminated defendant in the redacted confession.[13] This case is an appropriate vehicle to extend *Richardson* and to carve out an exception for cases where complete redaction fails.

This case involves four statements — three of which could have been completely redacted and therefore been admissible under the *Richardson* holding, and one which could not have been sufficiently redacted to avoid incrimination of Alvarado. The statement that Sanabria had helped "another person" package the cocaine could have been reworded to indicate only her involvement in that process. The statement that the main individual who supplied "another person" never brought the drugs himself but sent them by runner could have been phrased in the passive voice, to say that the cocaine was never delivered by the main supplier but was dropped off by a runner. The statement that Sanabria had told "another

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12. For discussions of the importance of complete redaction after *Richardson*, see *United States* v. *Di Carlantonio*, 870 F.2d 1058, 1062 (6th Cir.), *cert. denied*, 58 U.S.L.W. 3289 (Oct. 30, 1989), and *United States* v. *Yarbrough*, 852 F.2d 1522, 1536-37 (9th Cir.), *cert. denied*, 109 S. Ct. 171 (1988). *Cf. United States* v. *Soriano*, 880 F.2d 192, 197 (9th Cir. 1989) (interlocking confessions).

13. *See, e.g., United States* v. *Key*, 725 F.2d 1123 (7th Cir. 1984).

person'' not to sell to the informant because she thought he was a cop could have been changed to a statement that she had ''said not to'' sell to the informant, that she had ''not wanted to'' sell to him, or that she had ''argued against'' selling to him. Had a *Richardson* redaction been required, Alvarado's Sixth Amendment rights would have been protected.

The fourth statement, that Sanabria received $500 from ''another person'' in the holding cells, presents the opportunity for the formulation of a rule which recognizes that even complete redaction will cometimes be insufficient. Even if that statement had been ''completely'' redacted, it would still have inculpated Alvarado. If the statement were simply that Sanabria had received the money in the holding cell, it would be obvious that she received the money from some other person. Here, based on the evidence, the jury reasonably came to the conclusion that she received it from Alvarado, with devastating consequences for his defense.

III

This is a Recurring Problem Upon Which Lower Courts Need Guidance.

Joint trials comprise a large percentage of criminal trials. *See Richardson*, 481 U.S. 209-10. As the court stated in *Richardson*, joint trials are an important tool in the criminal justice system. This issue arises frequently.

Accordingly, it is not surprising that, since *Richardson*, seven cases have arisen in four Circuits in which the open issue in that decision has been inconsistently resolved. This common recurring issue should be resolved and a clear rule defined to guide the courts.

CONCLUSION

For the reasons set forth above, a writ of certiorari shall issue to review the judgment of the Court of Appeals for the Second Circuit.

Dated: November 20, 1989

Respectfully submitted,

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APPENDIX

Order of the United States Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 21st day of September, one thousand nine hundred and eighty-nine

UNITED STATES OF AMERICA,

Appellee-Cross-Appellant

v.

NOEL ALVARADO AND MAYRA SANABRIA,

Defendants-Appellants-Cross Appellees.

Filed: September 21, 1989
Docket Numbers: 88-1319; 88-1356; 88-1320; 88-1355

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by defendant-appellant-cross-appellee, Noel Alvarado.

Order Denying Rehearing

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ ELAINE B. GOLDSMITH
ELAINE B. GOLDSMITH
Clerk

Opinion of the United States Court of Appeals
Dated August 9, 1989

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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Nos. 347, 444

(Argued November 30, 1988 — Decided August 9, 1989)

Docket Nos. 88-1319, 88-1320

———♦———

UNITED STATES OF AMERICA,

Appellee,

v.

NOEL ALVARADO, a/k/a "Scoobie" and MAYRA SANABRIA,

Defendants-Appellants.

———♦———

Before:

VAN GRAAFEILAND, WINTER and MAHONEY, *Circuit Judges*.

John P. Cooney, Jr. and Charles E.F. Millard, Jr., New York City, *for defendant-appellant, Noel Alvarado*.

Opinion of the United States Court of Appeals
Dated August 9, 1989

Robert Koppelman, New York City, *for defendant-appellant, Mayra Sanabria.*

Nelson W. Cunningham and Kerri L. Martin, Asst. U.S. Attys. for S.D.N.Y., New York City (Rudolph W. Guiliani, U.S. Atty. for S.D.N.Y., New York City, of counsel), *for appellee.*

MAHONEY, *Circuit Judge*:

Defendants-Appellants Noel Alvarado and Mayra Sanabria appeal from judgments of conviction entered upon a jury verdict in the United States District Court for the Southern District of New York, Inzer B. Wyatt, *Judge*.[1] The indictment charged both defendants in three counts: count one—conspiring to distribute and possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846 (1982); count four—possessing approximately five ounces of a mixture containing cocaine, with intent to distribute it, in violation of 21 U.S.C. §§ 812 (1982 & Supp. V 1987), 841(a)(1)(1982), 841(b)(1)(C) (1982 and Supp. V 1987) and 18 U.S.C. § 2 (1982); and count five—using and carrying firearms during and in relation to the above crimes in violation of 18 U.S.C. § 924(c) (1982 & Supp. V 1987).[2] The jury convicted Alvarado on counts one,

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1. The government filed cross-appeals, 88-1355 and 88-1366, challenging the district court's imposition of sentences without applying the Sentencing Guidelines after finding the Guidelines unconstitutional. The cross appeals were stayed, upon consent of the parties, pending the resolution of *United States* v. *Martinez*, 873 F.2d 1436 (2d Cir. 1989) (mem.), were not presented to this panel, and are not considered in this opinion.

2. A third defendant, Charles Shannon (a.k.a. "Choco"), was also charged in count one. In addition, Shannon was charged separately in counts two and three with connected drug-related crimes. Prior to trial, however, Shannon became a fugitive and was severed as a defendant.

four and five, and Sanabria on counts one and four, but acquitted Sanabria on count five.

On appeal, Sanabria argues that her waiver of *Miranda* rights was coerced, and the resulting statements should therefore have been suppressed; and that the redaction of her statements, limitation of her cross-examination, and denial of her motion for severance deprived her of a fair trial. Alvarado contends that the introduction in evidence of testimony relating Sanabria's statements (after redaction by substituting the words "another person" for Alvarado's nickname) deprived him of a fair trial; that his motion for severance was improperly denied; that there was insufficient evidence to convict him on count five; and that his conviction on count five must be vacated as inconsistent with Sanabria's acquittal on that count in view of the identity of the evidence against them.

We affirm.

Background

The evidence at trial established that Hector Colon, a confidential informant for the Bureau of Alcohol, Tobacco & Firearms ("BATF"), made several visits to defendants' apartment at 2329 First Avenue in New York, New York in order to purchase cocaine. On the evening of November 10, 1987, Colon proceeded to the second floor apartment at that address, where he purchased a small quantity of cocaine from a youth named Alex for $45.00. On the evening of November 13, Colon returned and was met by defendant Mayra Sanabria, who opened the door. Alex then appeared and sold Colon 2.5 grams of cocaine for $125.00. On November 17, Colon returned for the third time, carrying photographs of two guns that he offered to sell. Alex answered the door, took one of the photographs, and sold Colon two packages of cocaine for $50.00. Colon observed Sanabria inside the apartment on this visit.

Colon returned to 2329 First Avenue on November 18 for the fourth time, where he was met by Alex in the front of the building and told that there was nothing to sell, and that he should return later. Upon Colon's return fifteen to twenty minutes later, Alex informed Colon that he would have to buy from one "Choco," who was selling for Alex in the street. Colon then purchased a bag of cocaine from Choco. The fifth time Colon returned, on November 19, defendant Noel Alvarado answered the door to the apartment. Alex immediately came to the door and directed Colon to buy from Choco in the street. Colon thereupon purchased two bags of cocaine from Choco.

On the evening of November 20, 1987, Colon returned with several BATF agents who had a warrant to search the apartment. After knocking and receiving no response, the agents broke in. Alvarado, Sanabria and Alex were found in the apartment. The search of the apartment revealed 108 grams of cocaine, glassine bags, triple beam balance scales, heat sealers, strainers with a residue of white powder, a loaded pistol in a drawer, a bullet-proof vest, and a locked safe containing two loaded handguns and $2,980.00. The agents also recovered numerous papers and records, including Alvarado's birth certificate, Sanabria's automobile title, Alvarado's address book, two statements from a Holiday Inn in the name of "Mayra Alvarado" listing 2329 First Avenue, New York, New York as her address, and a Consolidated Edison bill for the apartment in Alvarado's name.

Alvarado, Sanabria and the other alleged members of the conspiracy (Alex and Choco) were brought to BATF headquarters and questioned. Upon being taken from her holding cell, Sanabria waived her *Miranda* rights and was questioned for approximately thirty to forty-five minutes in the presence of three agents. Sanabria made statements which were presented to the jury by a BATF agent as follows:

Q. During that interview did she state to you in substance that she had told *another person* not to sell to the

confidential informant because she thought she had seen him with a shield and thought that the confidential informant was a cop?

A. Yes.

Q. During that interview did she also state to you in substance that she had helped *another person* package the coke?

A. Yes.

Q During the interview did she also state to you in substance that she knew the guns were in the apartment because she had played with them?

A. Yes.

Q. During that interview did she also state to you in substance that the main individual who supplied *another person* never dropped off the cocaine but would send one of the neighborhood teenagers as the runner?

A. Yes.

Q. Agent Polak, at or about the time of the interview was anything recovered from the defendant Sanabria?

A. Yes.

Q. What was that?

A. We asked her if she had any personal property besides jewelry and she displayed currency, United States currency. It was counted to be about $500.

She stated that she had obtained —

* * * * * * * * *

A. That she had obtained the money from *another person* by the holding cell.

Emphasis added.

During the actual questioning at BATF headquarters, Sanabria named "Scoobie," rather than "another person," in the four emphasized portions of the above testimony. "Scoobie" was Alvarado's nickname. The testimony concerning Sanabria's statements was redacted by substituting the phrase "another person" for "Scoobie" to avoid specifying Alvarado.[3]

Prior to trial, Sanabria moved to suppress the above statements, claiming that they were coerced. The district court conducted an evidentiary hearing, found that Sanabria was advised of her rights and voluntarily waived them, and denied the motion in a written opinion on April 8, 1988. After considering the government's proposed redactions to Sanabria's statements (quoted above), the court also denied Alvarado's motion for severance in an order dated April 7, 1988. Subsequent applications for severance by Sanabria and Alvarado were also denied.

Neither Alvarado nor Sanabria testified at trial. During cross-examination of one of the BATF agents, Sanabria elicited the "possibility" that one of the agents told Sanabria at BATF headquarters that "if she does not cooperate she is going to get ten years, just like Scoobie." Sanabria also elicited on cross-examination of another BATF agent that someone in the apartment other than Sanabria opened the safe for the agents during the search.

Alvarado called one witness, who testified that she and Alvarado had a romantic relationship and that Alvarado was in fact living with her in the Bronx when the drug transactions

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3. The district court ruled that one of Sanabria's statements, that she lived in the apartment with Alvarado, could not be successfully redacted. As a result, it was not presented to the jury.

charged in the indictment took place. On cross-examination, Alvarado's witness admitted that she did not know where Alvarado was when she was at work, and that sometimes he returned late at night to the allegedly shared apartment.

The trial lasted four days, with the jury returning a guilty verdict against Alvarado on counts one, four and five, and against Sanabria on counts one and four. The jury acquitted Sanabria on count five. Alvarado was sentenced to concurrent three-year prison terms on counts one and four, and a consecutive five-year prison term on count five. Alvarado also received a six-year term of supervised release on counts one and four to be served concurrently with a five-year term of supervised release on count five. In addition, fines totalling $2,500 on counts one and four were imposed upon Alvarado. Sanabria was sentenced to concurrent six-month terms of imprisonment on counts one and four, to be followed by a three-and-a-half year term of supervised release.

This appeal followed.

Discussion

The contentions of the parties have been outlined earlier herein. We consider first the separate claims of each defendant, and finally their contentions as to severance.

A. Sanabria's Claims

1. *Voluntariness of Statements.*

As indicated earlier, Sanabria did not testify at trial; nor did she testify at the pretrial suppression hearing. The primary testimony concerning the interview of Sanabria by BATF agents on November 20, 1987 was provided on both occasions by BATF agent Alina Sacerio-Polak. The more extensive testimony occurred at the pretrial suppression hearing, and was in substance that Sanabria was told that: she "had a daughter and . . . it would be in her best interest to cooperate;" any "cooperation could be brought to the

attention of the prosecuting attorney and the judge;'' and ''if she was to cooperate, it would be maintained . . . as quiet as possible, but there is always a possibility that she would have to testify.'' Sacerio-Polak further testified that it was ''a possibility'' that Sanabria was told ''that if she didn't cooperate, she was going to get ten years just like Scoobie.'' It is uncontested that Sanabria had her *Miranda* rights explained to her, and signed a written waiver of those rights, prior to the events above described.

Voluntariness is to be determined by viewing the totality of the circumstances and assessing whether ''the conduct of 'law enforcement officials was such as to overbear [the defendant's] will to resist and bring about confessions not freely self-determined. . . .''' *United States* v. *Ferrara*, 377 F.2d 16, 17 (2d Cir.) (quoting *Rogers* v. *Richmond*, 365 U.S. 534, 544, 81 S.Ct. 735, 741, 5 L.Ed.2d 760 (1961)), *cert. denied*, 389 U.S. 908, 88 S.Ct. 225, 19 L.Ed.2d 225 (1967); *see also United States* v. *Guarno*, 819 F.2d 28, 31 (2d Cir.1987). The factors to be considered include ''the type and length of questioning, the defendant's physical and mental capabilities, and the government's method of interrogation.'' *United States* v. *Mast*, 735 F.2d 745, 749 (2d Cir.1984). Although we will carefully examine the entire record and make an independent determination of voluntariness on appeal, *id.*, the factual findings of the district court will not be set aside unless clearly erroneous. *Guarno*, 819 F.2d at 30.[4]

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4. In its opinion denying Sanabria's pretrial suppression motion, the district court stated that: ''There is nothing in the record which shows any Government threats or promises; even earlier Sanabria *claims* of threats and promises found in her affidavit in support of this motion are for a time period *after* the November 20 statements.'' On appeal, Sanabria contends that the affidavit in question was mistaken in failing to attribute the ''threats and promises'' to the November 20 interview. In any event, the testimony of BATF agent Sacerio-Polak describes statements made

Sanabria invokes *United States* v. *Tingle*, 658 F.2d 1332 (9th Cir.1981), in which a confession was determined to be involuntary where the interrogating agent accused Tingle of lying, *id.* at 1333; intimated that Tingle's accomplice had told the agent that Tingle was responsible for planning and executing the staged robbery under investigation, *id.* at 1334; and:

> recited a virtual litany of the maximum penalties for the crimes of which Tingle was suspected, totaling 40 years imprisonment. He expressly stated, in a manner that could only be interpreted in light of the lengthy sentence he had described, that Tingle would not see her two-year-old child "for a while." Referring specifically to her child, [the agent] warned her that she had "a lot at stake." [The agent] also told Tingle that it would be in her best interest to cooperate and that her cooperation would be communicated to the prosecutor. He also told her that if she failed to cooperate he would inform the prosecutor that she was "stubborn or hard-headed."

Id. at 1336. Tingle testified that the agent threatened that she would never see her child again if she failed to cooperate. *Id.* at 1334 n. 1. The Court concluded that "the purpose and objective of the interrogation was to cause Tingle to fear that, if she failed to cooperate, she would not see her young child for a long time." *Id.* at 1336.

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to Sanabria at the November 20 interview which Sanabria deems to constitute the "threats and promises" which we must review. We credit that testimony, summarized earlier in the text and the only significant evidence of record on the issue, in reaching our determination as to voluntariness.

The circumstances presented here are much less compelling. BATF agent Sacerio-Polak's testimony, taken in the light most favorable to Sanabria, does not establish any reiterated recital of maximum penalties, threats to denounce Sanabria to the prosecutor, repetitive references to separation from her daughter, or accusations of lying. Sanabria was interviewed for approximately thirty to forty-five minutes, during which period her physical and mental capabilities were not impaired. In sum, the questioning and concomitant psychological pressure here was far less than that present in *Tingle*, and were not such as to "overbear [the defendant's] will and bring about [a] confession[ ] not freely self-determined." *Guarno*, 819 F.2d at 30 (citations omitted).

Sanabria's other allegations of coercion—that she was told that her cooperation would result in a lesser sentence and would be revealed only to the judge and prosecutor—are also unavailing. It is not improper "to mention the situation which [the defendant] faced and the advantages to him if he assisted the government." *United States* v. *Pomares*, 499 F.2d 1220, 1222 (2d Cir.), *cert. denied*, 419 U.S. 1032, 95 S.Ct. 514, 42 L.Ed.2d 307 (1974). Statements are not involuntary "merely because the suspect was promised leniency if he cooperated with law enforcement officials," so long as the circumstances do not otherwise suggest coercion. *Guarno*, 819 F.2d at 31. Finally, an undertaking to keep any cooperation as confidential as possible is typically a condition set by an *informant* for his or her cooperation; we find no warrant for the proposition that the government, by promising such confidentiality, thereby impermissibly coerces the defendant.

2. *Redaction of Sanabria's Statements and Limitation of Her Cross-Examination.*

Sanabria argues that the admission of her statements in redacted, as opposed to original, form "allowed the government to paint her as an important participant and decision maker in the drug conspiracy in her own right rather than a

mere observer and companion to Alvarado as suggested by the unredacted statements . . . ." Sanabria claims that the "rule of completeness" required her statements to be admitted in unredacted form.[5]

In *United States* v. *Castro*, 813 F.2d 571 (2d Cir.), *cert. denied*, ___ U.S. ___, 108 S.Ct. 137, 98 L.Ed.2d 94 (1987), we upheld a conviction despite the defendant's claim that he was prejudiced by the admission of testimony concerning his statements with his codefendant's name redacted. The defendant had shown federal agents the location of cocaine in a black plastic bag, adding that the bag belonged to his codefendant. The testimony at trial described those statements without any mention of the codefendant, but noting that the defendant had "in substance" denied ownership of the bag and its contents. The court held that:

> While Castro had an interest in having his statement presented in context, the court had concurrent obligations both to protect the interests of the co-defendant . . ., who could have been implicated by Castro's full statement, and to consider the interests of judicial economy, which are advanced by a joint trial.

Id. at 576. Upon review, we will not disturb the district court's balancing of these interests unless an abuse of discretion appears. *Id.* (citing *United States* v. *Weisman*, 624 F.2d 1118, 1128-29 (2d Cir.), *cert. denied*, 449 U.S. 871, 101 S.Ct. 209, 66 L.Ed.2d 91 (1980)).

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5. This rule is stated as to writings in Fed.R.Evid. 106, but Fed.R.Evid 611(a) renders it substantially applicable to oral testimony, as well. *United States* v. *Castro*, 813 F.2d 571, 576 (2d Cir.) (citing 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 106[01], at 106-4 (1986 ed.)), *cert. denied*, ___ U.S. ___, 108 S.Ct. 137, 98 L.Ed.2d 94 (1987).

The redaction of Sanabria's statements did not violate the "rule of completeness." To the extent that the rule applies to oral testimony, it requires that such testimony "'should at least represent the tenor of the utterance as a whole, and not mere fragments of it.'" *Id.* (quoting 7 Wigmore on Evidence § 2099, at 618 (Chadbourn rev. ed. 1978)). Consequently, the rule is violated only where admission of the statement in redacted form distorts its meaning or excludes information substantially exculpatory of the declarant. *See, e.g., United States* v. *Kaminski*, 692 F.2d 505, 522 (8th Cir. 1982).

In this case, the admission of Sanabria's statements in redacted form neither distorted their meaning nor excluded information which substantially exculpated her. If Alvarado's name had appeared in Sanabria's incriminating statements, their only effect would have been to incriminate Alvarado more, and not Sanabria less. The extent of Sanabria's involvement, her level of complicity, and the inculpatory nature of her admissions would have been the same whether "Scoobie" or "another person" had been uttered in the testimony reciting her statements, which established in either event her suspicions that Colon was an undercover policeman, her participation in packaging the cocaine, her knowledge concerning the mode of its delivery from the supplier, and her receipt of money from an accomplice in the vicinity of the BATF holding cell. Thus, we find that the district court was well within its discretion in admitting Sanabria's statements in redacted form. The ruling protected Alvarado's right to confrontation of the witnesses against him and served the interests of judicial economy by allowing for a joint trial of two defendants whose alleged criminal conduct arose from the same set of facts. *Castro*, 813 F.2d at 576.

In light of the above, we see little substance to Sanabria's claim that her counsel should have been allowed to cross-examine prosecution witnesses to establish that she received the $500 in the vicinity of the holding cell from Alvarado

rather than one of the others (Alex and Choco) arrested with them. The scope and extent of cross-examination are generally within the sound discretion of the trial court. *Pedroza* v. *United States*, 750 F.2d 187, 195 (2d Cir. 1984) (collecting cases). There was no abuse of that discretion in foreclosing cross-examination that would have been of marginal benefit to Sanabria while clearly violative of Alvarado's right of confrontation, to which we now turn.

B. Alvarado's Claims.

1. *Admission in Evidence of Testimony Concerning Sanabria's Redacted Statements.*

Alvarado contends that admission of Sanabria's redacted statements impermissibly inculpated Alvarado, thereby denying his sixth amendment right to confront the witnesses against him because Sanabria was a nontestifying codefendant, not subject to cross-examination.

Richardson v. *Marsh*, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987), is the Supreme Court's latest pronouncement on this question. The Court there held that where a codefendant's statement "was not incriminating [to the defendant] on its fact, and became so only when linked with evidence introduced later at trial," it was proper to presume that a jury would follow the court's limiting instruction to consider a codefendant's statement only against him. *Id.* at 208, 107 S.Ct. at 1707. In so doing, the court refused to extend *Bruton* v. *United States*, 391 U.S.123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), which held that a limiting instruction was inadequate where the codefendant's statement inculpated the protesting defendant on its face.

Alvarado initially contends that the redacted statements, standing alone, were unconstitutionally inculpatory. This argument is wholly unpersuasive. It is obvious from a reading of the testimony in question that some context must be provided by other evidence before the phrase "another person" can be understood to refer to a specific individual.

Alvarado's alternative contextual approach was rejected by the Supreme Court in *Richardson*. Alvarado argues, as was contended in *Richardson*, that because the evidence taken as a whole could be read to link Alvarado to the redacted statements, thereby inculpating him, the statements should not have been admitted in any form. In *Richardson*, however, the court held that statements which became incriminating "only when linked with evidence introduced later at trial," 107 S.Ct. at 208, were insufficient to raise the presumption that jurors would disregard the court's limiting instructions, and thus presented no sixth amendment violation. *Id.* at 211.

Alvarado correctly points out, however, that the redacted confession in *Richardson* "eliminate[d] not only the defendant's name, but any reference to her existence," *id.*, and that the Court explicitly left the question presented in this case open by "express[ing] no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." *Id.* 107 S.Ct. at 211 n. 5.

We recently considered this precise question in *United States* v. *Tutino*, Nos. 88-1231, 88-1301, 88-1302, 88-1303, slip op. at 4254-57, ___ F.2d ___, ___ _ ___ (2d Cir. June 29, 1989), where we stated:

> This Court has held that a "defendant's *Bruton* rights [are] violated . . . only if the statement, standing alone, would clearly inculpate him without introduction of further independent evidence." *United States* v. *Wilkinson*, 754 F.2d 1427, 1435 (2d Cir.), *cert. denied*, 472 U.S. 1019 [105 S.Ct. 3482, 87 L.Ed.2d 617] (1985). This principle was recently reaffirmed by the Supreme Court in *Richardson* v. *Marsh*, 481 U.S. 200 [107 S.Ct. 1702, 94 L.Ed.2d 176] (1987), In *Richardson*, the Supreme Court explicitly rejected a "contextual" approach, focusing on whether the redacted statement itself was "facially incriminating" as to the co-defendant. *Id.*, at 208-209. Under this analysis, whether a co-defendant's statement would be incriminating when

> linked with other evidence in this case is not relevant if the statement is not incriminating on its face. *Id.*
>
> This case differs from *Richardson* only in that Tutinos's redacted statement does not completely eliminate any reference to the existence of others, but contains neutral pronouns in place of the names of co-defendants. *We hold that a redacted statement in which the names of co-defendants are replaced by neutral pronouns, with no indication to the jury that the original statement contained actual names, and where the statement standing alone does not otherwise connect co-defendants to the crimes, may be admitted without violating a co-defendant's* Bruton *rights.* Although the *Richardson* Court declined to rule on the admissibility of such a redacted confession, the principles set forth by the the Supreme Court in *Richardson* are consistent with prior decisions of this Court and our holding today. *See e.g., United States* v. *Wilkinson*, 754 F.2d at 1435; *United States* v. *Knuckles*, 581 F.2d 305, 313 (2d Cir.), *cert. denied*, 439 U.S. 986 [99 S.Ct. 581, 58 L.Ed.2d 659] (1978).

Id. at 4256-57, ___ F.2d at ___ _ ___. (emphasis added); *see also United States* v. *Burke*, 700 F.2d 70, 85 (2d Cir.), *cert. denied*, 464 U.S. 816, 104 S.Ct. 72, 78 L.Ed.2d 85 (1983).

Alvarado contends that our decision in *United States* v. *Danzey*, 594 F.2d 905 (2d Cir.), *cert. denied*, 441 U.S. 951, 99 S.Ct. 2179, 60 L.Ed.2d 1056 (1979), requires reversal on this issue. *Danzey*, however, is clearly distinguishable. In that case, the protesting defendant's name had been replaced in a nontestifying codefendant's statement by the term "blank," rather than "another person," and a testifying agent told the jury that the codefendant had used names in his original statement. This allowed the jury to "fill in the blank" with the defendant's name. 594 F.2d at 918. We reversed and granted a new trial, but explicitly stated that it would have been permissible to have "simply referred to the

other individual . . . without referring to him as 'Blank' and thus preventing . . . the jury from knowing that the name of a particular individual had been redacted." *Id.* at 919. That is what was done here.

In light of the foregoing, we conclude that the admission of testimony relating Sanabria's redacted statements, with a limiting instruction, did not violate Alvarado's right of confrontation under the sixth amendment in violation of *Bruton*.

2. *Sufficiency of the Evidence on Count Five.*

Alvarado contends that the evidence convicting him on count five for violation of 18 U.S.C. § 924(c)(1) (1982 & Supp. V 1987) was insufficient as a matter of law in light of *United States* v. *Feliz-Cordero*, 859 F.2d 250 (2d Cir.1988). We find, however, that our recent decision in *United States* v. *Meggett*, 875 F.2d 24 (2d Cir.1989), requires affirmance on the facts of this case. Both *Feliz-Cordero* and *Meggett* construed those provisions of 18 U.S.C. § 924(c)(1), also applicable here, which stipulate criminal penalties for anyone who "during and in relation to any . . . drug trafficking crime . . . uses or carries a firearm . . . ." In *Meggett* we interpreted *Feliz-Cordero* as holding:

> that a gun found in a dresser drawer of an apartment in which some of the defendants' narcotics paraphernalia was located had not been "used" within the meaning of § 924(c)(1) . . . . Implicitly recognizing the teaching of the prior case law to the effect that "use" requires possession of a gun under circumstances where the weapon is so placed as to be an integral part of the offense, we emphasized the absence of proof that the defendants in *Feliz-Cordero* had placed the weapon to have it available for ready use during the transaction.

Meggett, 875 F.2d at 29.

We held in *Meggett* that a defendant can "use" a gun in violation of § 924(c)(1) without firing or exhibiting it. *Id.* A

gun can be used if "possession [of the gun] is an integral part of the predicate offense and facilitates the commission of that offense." *Id.* Reviewing various circuit court precedents involving "possession of narcotics at premises where weapons were also located," we stated: "The courts had no trouble in finding that the presence of these guns constituted 'use' to protect the defendant's possession of the narcotics. The guns were an integral part of the narcotics offense and facilitated that offense." *Id.* We went on to find that the jury in *Meggett* "could reasonably conclude that the five loaded firearms in [defendant's] apartment were on hand to protect that apartment as a storage and processing point for large quantities of narcotics and that therefore the presence of weapons furthered or facilitated the narcotics operation and was an integral part thereof." *Id.*

United States v. *Grant*, 545 F.2d 1309 (2d Cir.1976), *cert. denied*, 429 U.S. 1103, 97 S.Ct. 1130, 51 L.Ed.2d 554 (1977), which we cited in both *Meggett*, 875 F.2d at 27-29, and *Feliz-Cordero*, 859 F.2d at 254 (where it was distinguished), is also instructive. In *Grant*, a search revealed significant quantities of cocaine and five loaded weapons. The court found that this "small arsenal" of weapons comprised a "tight security operation to protect large quantities of cocaine and hence to commit the felony of possessing cocaine with intent to distribute it," and upheld the section 924(c) conviction. 545 F.2d at 1312-13.

As in *Meggett* and *Grant*, the evidence here supports the jury finding that the several loaded weapons in Alvarado's apartment were strategically located to protect the substantial quantities of cocaine that were packaged and sold in the apartment, as established both by Colon's several drug purchases there and the drugs and drug paraphernalia seized upon execution of the search warrant, and to provide added security during drug sales. Three guns were found in Alvarado's apartment. The first was located in a desk in the "cutting room." On top of the desk were various drug

paraphernalia, including balance scales, heat sealers, strainers with a residue of white powder, yellow packages, a box of small plastic glassine envelopes, and a round piece of glass with traces of cocaine.

The two other weapons, along with nearly $3,000 in cash, were found in a safe in a walk-in closet that was part of the cutting room. Next to the safe were two stashes of cocaine and a bullet-proof vest. Although it is true that these guns were placed in a locked safe, a reasonable jury could infer that the guns were located there to protect both the money and the cocaine in the event that a drug deal went sour and a buyer demanded a return of his cash. Moreover, the fact that a bullet-proof vest was close by could lead a jury to believe that Alvarado was quite prepared to use the guns. A jury could reasonably infer that the guns were "on hand to protect th[e] apartment as a storage and processing point for large quantities of narcotics," and that they "furthered or facilitated the narcotics operation and w[ere] an integral part thereof." *Meggett*, 875 F.2d at 29. Thus, unlike *Feliz-Cordero*, there was ample proof "that the defendants . . . had placed the weapon[s] to have [them] available for ready use during [drug] transaction[s]," *Meggett*, 875 F.2d at 29 (construing *Feliz-Cordero*), and the evidence was accordingly sufficient to support a conviction on count five.

3. *Consistency of the Verdicts on Count Five.*

Alvarado challenges his conviction on count five of the indictment on the ground that the jury's acquittal of Sanabria on the same charge, despite the identity of the evidence against them, renders the verdict so inconsistent that his conviction cannot be permitted to stand.

It is well settled that "consistency in the verdict is not necessary." *Dunn* v. *United States*, 284 U.S. 390, 393, 52 S.Ct. 189, 190, 76 L.Ed. 356 (1932). The Supreme Court reaffirmed the *Dunn* rule in *United States* v. *Powell*, 469 U.S.

57, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984), stating that inconsistent verdicts are often the product of "mistake, compromise, or lenity," *id.* at 65, 105 S.Ct. at 476, and that justice would not be served by awarding criminal defendants new trials even where "verdicts cannot rationally be reconciled," *id.* at 69, 105 S.Ct. at 479. We most recently followed *Powell* in *United States* v. *Chang An-Lo*, 851 F.2d 547, 559-60 (2d Cir.1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 493, 102 L.Ed.2d 530 (1989), in refusing to vacate arguably inconsistent verdicts.

Alvarado nonetheless contends that these cases all relate to inconsistency between verdicts on various counts relating to a single defendant, rather than inconsistency between verdicts concerning two defendants, as to whom the evidence is allegedly identical, on the same count. Alvarado points to a 1920 decision of this court as assertedly "recognizing that where the evidence as to both defendants is exactly the same, inconsistent verdicts will not be allowed to stand." *See American Socialist Soc'y* v. *United States*, 266 F. 212 (2d Cir.), *cert. denied*, 254 U.S. 637, 41 S.Ct. 12, 65 L.Ed. 451 (1920).

In the first place, the extent to which *American Socialist Soc'y* "recognizes" such a rule is not at all clear. The court's opinion included a sentence to that effect,[6] but the ruling was that the verdicts were not necessarily inconsistent, and the challenged conviction was affirmed. Secondly, assuming that we recognized or even established any such rule, it is unlikely that it survived *Dunn* and *Powell*. Finally, and in any event, Alvarado has not shown that the evidence against Sanabria and him on this count was identical.

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6. "If the acquittal of Nearing was on the first ground, the society ought also to have been acquitted." 266 F.2d at 214.

Sanabria, who was acquitted on the gun charge, told an agent after her arrest that she knew the guns were there because she had "played" with them. Alvarado contends that this admission inculpates Sanabria more heavily than Alvarado in the gun crime, but the jury could have viewed it as exculpatory because tending to establish that the extent of Sanabria's contact with the guns consisted only of "playing" with them, rather than readiness to use them in furtherance of narcotics trafficking. More to the present point, (1) the evidence was clearly not identical as to the two defendants; and (2) this is precisely the type of speculation from which *Dunn* and *Powell* require us to refrain.

C. Denial of Defendants' Severance Motions

Both Sanabria and Alvarado maintain that the district court improperly denied their motions for a severance. Alvarado claims prejudice from the introduction of Sanabria's statements in any form, and Sanabria asserts prejudice from the fact that her statements were redacted at all, and (as indicated earlier) from a related curtailment of her cross-examination. Alvarado further contends that Sanabria's defense was antagonistic to his because of testimony (in cross-examination of a BATF agent) concerning the alleged threat to Sanabria that she might be sentenced to ten years, like Alvarado, thus assertedly leading the jury to infer that "Alvarado was so culpable that such an extended jail term was appropriate for him;" and testimony that someone other than Sanabria opened the safe containing the guns at the time of the raid on the apartment, thus assertedly leading the jury (1) to infer that Alvarado had done so, and (2) as a result to convict him on count five.

As we have stated, decisions to sever are committed to the broad discretion of the trial court, and will be reversed only upon a showing of "'substantial prejudice.'" *United States* v. *Potamitis*, 739 F.2d 784, 790 (2d Cir.) (quoting *United States* v. *Cunningham*, 723 F.2d 217, 230 (2d Cir.1983), *cert. denied*, 466 U.S. 951, 104 S.Ct. 2154, 80 L.Ed.2d 540

(1984)), *cert. denied*, 469 U.S. 934, 105 S.Ct. 332, 83 L.Ed.2d 269 (1984). Substantial prejudice does not simply mean a better change of acquittal. *Id.* Rather, a defendant must establish that a "'miscarriage of justice"' has occurred. *Id.* (quoting *United States* v. *Herrera*, 584 F.2d 1137, 1143 (2d Cir. 1978) (quoting *Schaffer* v. *United States* 221 F.2d 17 (5th Cir.1955))). Moreover, in determining whether severance was properly denied, we must "'consider the need for judicial economy and the extent to which the judge instructed the jury to consider the evidence separately with respect to each defendant."' *United States* v. *Carson*, 702 F.2d 351, 366 (2d Cir.) (quoting *United States* v. *Losada*, 674 F.2d 167, 171 (2d Cir.), *cert. denied*, 457 U.S. 1125, 102 S.Ct. 2945, 73 L.Ed.2d 1341 (1982)), *cert. denied*, 462 U.S. 1108, 103 S.Ct. 2456, 77 L.Ed.2d 1335 (1983).

For the reason stated earlier herein, defendants' claims related to the admissibility of Sanabria's statements are unpersuasive. The statements made by Sanabria were properly admitted against her as evidence of her participation in the criminal transactions. Redaction of the statements did not heighten Sanabria's guilt or the damaging nature of her admissions. Thus, the fact the Sanabria would have had her statements admitted in unredacted form were she tried separately did not constitute substantial prejudice. Likewise, there was no miscarriage of justice with respect to Alvarado. The statements were carefully redacted to avoid impermissibly implicating Alvarado, and the jury was instructed to consider Sanabria's statements only against her.

Alvarado also claims that severance was required because the defenses were so antagonistic that "'the jury, in order to believe the core of testimony offered on behalf of [one] defendant, must necessarily disbelieve the testimony offered on behalf of his co-defendant."' *United States* v. *Potamitis*, 739 F.2d 784, 790 (2d Cir.) (quoting *United States* v. *Carpentier*, 689 F.2d 21, 28 (2d Cir.1982) (quoting *United States* v. *Berkowitz*, 662 F.2d 1127, 1134 (5th Cir.1981)), *cert.*

denied, 459 U.S. 1108, 103 S.Ct. 735, 74 L.Ed.2d 957 (1983)), *cert. denied*, 469 U.S. 934, 105 S.Ct. 332, 83 L.Ed.2d 269 (1984). We do not find such a situation present here. Although some antagonism exists between Alvarado's defense that he was not involved in the drug operation at the apartment and Sanabria's defense that she was only a bystander in Alvarado's operation, "'[a] simple showing of some antagonism between defendants' theories of defense does not require severance.'" *Id.* (quoting *Carpentier*, 689 F.2d at 27-28).

In this case, the jury did not have to disbelieve one defendant in order to believe the other. Furthermore, the specific instances of prejudice cited by Alvarado (in addition to the admission of testimony concerning the redacted statements of Sanabria) are far too speculative and tangential to have required severance. Rather, with the alleged criminal conduct arising out of the same core of facts, a joint trial clearly served the interests of judicial economy. In addition, the trial judge repeatedly cautioned the jurors to consider the evidence separately with respect to each defendant. We conclude that any antagonism between their defenses did not result in substantial prejudice to the defendants, and no severance was required.

Conclusion

The judgments of conviction are affirmed.

Order of the District Court
Entering Judgment on Jury Verdict

NOEL ALVARADO
23-29 First Avenue Apt 1 1
New York, New York

SOUTHERN DISTRICT OF NEW YORK

Docketing 88 Cr. 00110-01 (IBW)

JUDGMENT AND PROBATION/COMMITMENT ORDER

DATE OF OFFENSE: NOVEMBER 1987

In the presence of the attorney for the government ADAM HOFFINGER, AUSA the defendant appeared in person on this date JULY 13, 1988 with counsel JOHN P. COONEY, ESQ.

PLEA: NOT GUILTY

FINDING & JUDGMENT: There being a verdict of GUILTY, on counts one, four and five.

Defendant has been convicted as charged of the offenses of:

in count one conspiring under 21 U.S.C. § 846 to distribute and possess with intent to distribute quantities of cocaine, a Schedule II narcotic drug, and to violate the narcotics laws of the United States, specifically 21 U.S.C. § 812, 841(a)(1), 841(b)(1)(C);

in count four, unlawfully, intentionally, and knowingly possessing with intent to distribute

a substance containing cocaine, a Schedule II narcotic substance, in violation of 21 U.S.C. § 812, 841(a)(1), 841(b)(1)(C) and 18 U.S.C. § 2; and

in count five, unlawfully, intentionally and knowingly and during and in relation to drug trafficking crimes for which he may be prosecuted in a court of the United States, using and carrying firearms in violation of 18 U.S.C. § 924(c).

SENTENCE OR PROBATION ORDER: The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that. The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of:

THREE (3) YEARS ON COUNT ONE and after imprisonment the defendant is placed on a term of supervised released for six (6) years;

THREE (3) YEARS ON COUNT FOUR and after imprisonment the defendant is placed on a term of supervised release for six (6) years, the sentence of imprisonment and supervised release imposed on this count four to run concurrently with the sentence of imprisonment and supervised release imposed on count one; and

FIVE (5) YEARS ON COUNT FIVE and after

imprisonment the defendant is placed on a term of supervised release for five (5) years, the term of imprisonment imposed on this count five to be consecutive to the term of imprisonment imposed on counts one and four concurrently, the term of supervised release imposed on this count to run concurrently with the term of supervised release imposed on counts one and four.

IT IS FURTHER ORDERED THAT the defendant pay to the United States a fine of $1,250 on count one and $1,250 on count four for a total fine of $2,500.

IT IS FURTHER ORDERED THAT the defendant pay to the United States a special assessment of $50 on each of counts one, four and five for a total special assessment of $150.

IT IS FURTHER ORDERED THAT the defendant be subject to the standard conditions of supervised release; and also to those special conditions imposed by the Court which are listed on Attachment #1.

/s/ INZER B. WYATT
Inzer B. Wyatt
U.S.D.J.
Filed July 15, 1988

ATTACHMENT #1

1. The defendant shall participate in a program approved by the probation officer for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol.
2. The defendant shall not commit any crimes, federal, state, or local.
3. The defendant shall not possess a firearm or other dangerous weapon.
4. The defendant shall provide financial information to the probation officer upon request.
5. The defendant shall provide information as to his employment activities to the probation officer upon request.

/s/ Inzer B. Wyatt, USDJ
Filed 7/15/88

Memorandum Opinion and Order of the District Court for the Southern District of New York Denying Motion for Severance

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

—against—

NOEL ALVARADO, a/k/a "Scoobie," MAYRA SANABRIA, and CHARLES SHANNON, a/k/a "CHOCO,"

Defendants.

88 Cr. 0110 (IBW) MEMORANDUM OPINION AND ORDER FILED APRIL 7, 1988

This is a motion for defendant Alvarado "for an order severing the trial of defendant Noel Alvarado from that of defendant Mayra Sanabria" (Fed. R. Crim. P. 14). The notice of motion is supported by an affidavit of an attorney for movant and a memorandum of law.

Movant argues that a joint trial presents unavoidable problems under *Bruton* v. *United States*, 391 U.S. 123 (1968), because of statements allegedly made by Sanabria while in custody which are inculpatory of both Alvarado and Sanabria and may be introduced by the prosecution at trial. These statements appear to have been made on two separate occasions: (1) on November 20, 1987, following the arrest of Alvarado and Sanabria (2) on November 25, 1987, when Sanabria was present at "agents' office."

The government, however, does not intend to offer any proof of defendant Sanabria's statements on November 25, 1987 (letter to me, dated April 6, 1987).

In connection with the statements made by Sanabria on November 20, while these statements do implicate co-defendant Alvarado, the government proposes to edit Sanabria's statements, deleting any reference to defendant Alvarado (letter to defense counsel, dated March 30, 1988). Presenting the statements in the edited form proposed by the Government would eliminate the *Bruton* problem. The proposed edited statements do not implicate Alvarado. Our Court of Appeals has held, "[a] defendant's *Bruton* rights would be violated...only if the statement, standing alone, would clearly inculpate him without introduction of further independent evidence," *United States v. Wilkinson*, 754 F.2d 1427, 1435 (2d Cir. 1985). Redaction of a codefendant's statement and appropriate limiting instructions to the jury, a procedure which had divided the Courts of Appeal, was settled and approved by the Supreme Court about a year ago in *Richardson* v. *Marsh*, _____ U.S. _____ (April 21, 1987).

The motion is denied.

So ordered.

/s/ INZER B WYATT
Inzer B. Wyatt
United States District Judge

April 7, 1988

Transcript of Trial Proceedings Before the District Court for the Southern District of New York

UNITED STATES DISTRICT COURT

FOR THE
SOUTHERN DISTRICT OF NEW YORK

———♦———

UNITED STATES OF AMERICA

v.

NOEL ALVARADO, a/k/a "Scoobie" and MAYRA SANABRIA

Defendants.

———♦———

Before:

Hon. Inzer B. Wyatt, United States District Judge.

PORTIONS OF TRIAL TRANSCRIPT

April 19, 1988

[DIRECT EXAMINATION of BATF Special Agent Arthur CULLEN by Assistant U.S. Attorney Howard SHAPIRO]

Transcript at 247-49:

Q. . . . After you and Agent Blanch completed the search of the second floor apartment at 2329 First Avenue, what did you do next?

A. The evidence was collected and taken to the ATF office at 90 Church Street.

Q. And then what happened?

A. The evidence was then marked for identification, the paperwork was completed on the evidence.

Q. And what was the next thing that occurred?

A. As far as what, sir?

Q. Did you do anything with respect to any of the defendants in this case?

A. Yes, I did.

Q. What did you do?

A. By this time the defendants had been — had finished being processed by other agents that were assisting me that night. I then interviewed each defendant.

Q. And did you do anything else with respect to any of the other defendants?

A. As I said, after the processing procedure was finished, they were fingerprinted, photographed, I would take them into an adjoining room where I would read them their Miranda warning and speak to them at that time. Each defendant.

Q. Agent Cullen, did you search either of the defendants?

MR. KOPPELMAN: I object to the leading, judge.

THE COURT: I will permit it.

Q. Did you search either of the defendants at that time?

A. All the defendants were searched by me, except for Ms. Sanabria who was searched by Agent Polak.

Q. And was anything recovered from the defendant Sanabria, if you know?

A. United States currency was recovered from her.

Q. Do you know how much?

A. $500, sir.

Transcript at 250:

Q. And did you also — you stated a moment ago, you searched defendant Noel Alvarado?

A. Yes.

Q. Did you recover anything in the search of defendant Alvarado?

A. I recovered several items.

Q. What did you recover?

A. I recovered initially a United States currency $488, a beeper that was attached to his belt and further conducting the search I found two packets of cocaine in his right shoe.

April 20, 1988

[DIRECT EXAMINATION of BATF Special Agent Alina SACERIO-POLAK by SHAPIRO]

Transcript at 363:

Q. And did there come a time then when you left the second floor apartment?

A. Yes.

Q. And where did you go?

A. I took Mayra and Alex to the office of the Bureau of Alcohol, Tobacco & Firearms at 90 Church Street in Manhattan.

Q. And what did you do upon your arrival there?

A. Well, I placed her in the cell and I waited for the rest of the agents to come who are more familiar with the case and then they proceeded to process her, which means taking fingerprints, photographs, personal history and then after that they asked me to search her, which I did after.

Q. Were you involved in taking a personal history of the defendant Sanabria?

A. Yes.

Transcript at 369-71:

Q. During that interview did she state to you in substance that she had told another person not to sell to the confidential informant because she thought she had seen him with a shield and thought that the confidential informant was a cop?

A. Yes.

Q. During that interview did she also state to you in substance that she had helped another person package the coke?

A. Yes.

Q. During that interview did she also state to you in substance that she knew the guns were in the apartment because she had played with them?

A. Yes.

Q. During that interview did she also state to you in substance that the main individual who supplied another person never dropped off the cocaine but would send one of the neighborhood teenagers as the runner?

A. Yes.

Q. Agent Polak, at or about the time of the interview was anything recovered from the defendant Sanabria?

A. Yes.

Q. What was that?

A. We asked her if she had any personal property besides jewelry and she displayed currency, United States currency. It was counted to be about $500.

She stated that she had obtained —

Q. Did —

MR. KOPPELMAN: Judge, I think she should be allowed to finish the answer.

MR. SHAPIRO: I don't think it was responsive.

MR. KOPPELMAN: I think she should be allowed to finish the answer.

MR. SHAPIRO: All right.

THE COURT: The government consents.

MR. KOPPLEMAN: Thank you.

MR. COONEY: I object, your Honor.

THE COURT: It is not being offered against your client.

Q. Go ahead, Agent Polak.

A. That she had obtained the money from another person by the holding cell.

Portions of Trial Transcript

[CROSS-EXAMINATION of POLAK by Robert KOPPELMAN, counsel for Sanabria]

Transcript at 382:

Q. And was Mr. Alvarado either in the same cell with her or in the next cell?

THE COURT: No, I won't permit that question to be answered.

Q. Was there someone who had been taken from the apartment —

THE COURT: I won't permit that question either. I won't permit any further questions about the identity of persons in the holding cell.

Q. Did Ms. Sanabria — don't tell us — just answer yes or no — did Ms. Sanabria tell you the name of the person who gave her the money in the holding cell?

THE COURT: I won't permit that question to be asked either —

MR. KOPPELMAN: I am not asking for the name, Judge.

THE COURT: You know the reason for my rulings. Now drop this line of questioning, sir.

Portions of Trial Transcript

April 21, 1988

[CLOSING ARGUMENT by SHAPIRO]

Transcript at 527:

All of this is Noel Alvarado and Mayra Sanabria's cocaine, because Noel Alvarado and Mayra Sanabria were running a brisk cash business out of that second floor apartment.

There was a thriving mom and pop grocery store there with the proprietors living on the premises, using teenagers to sell and selling only one distinctive product, their private labeled cocaine.

Transcript at 532:

So, of course, there is much more than just the yellow packets. There is much more that shows Mayra Sanabria and Noel Alvarado were the mom and pop for their thriving mom and pop drug store.

Transcript at 536:

How else do you know these two defendants are the mom and pop? Well they are each seen in the apartment on various occasions by the confidential informant while he's negotiating for drugs. It is not like the drug operation only happens while they are off somewhere. They are there, the drug operation is going on, it is being conducted right out of their apartment.

Portions of Trial Transcript

Transcript at 538:

Even if he had been [away] every night, it doesn't change the evidence in this case. No one says that their mom and pop store was open 24 hours a day.

[REBUTTAL by SHAPIRO]

Transcript at 608:

As to the defendant Alvarado and Sanabria, after all, who allow their apartment to be turned into a business location without being involved in it in some way, without participating? Who in particular would allow someone to use their apartment to deal and package and distribute drugs without in some way being involved? It is simply a preposterous position.